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Labor Law - Unauthorized Strikes - Union Has the Duty to Use Every Reasonable Means Available to End Wildcat Strike

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cumstances in which the parties had not clearly agreed in their contract to arbitrate the particular dispute.[75] *Gateway* stands as a vigorous reaffirmation of a strong federal policy in favor of binding arbitration of labor disputes.

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LABOR LAW — UNAUTHORIZED STRIKES — UNION HAS THE DUTY TO USE EVERY REASONABLE MEANS AVAILABLE TO END WILDCAT STRIKE.

Eazor Express, Inc. v. Teamsters Union (W.D. Pa. 1973)

Plaintiff employers, Eazor Express, Inc. (Eazor) and Daniels Motor Freight Co. (Daniels), brought suit in the United States District Court for the Western District of Pennsylvania[1] against the International Brotherhood of Teamsters (the International) and Locals 249 and 377[2] seeking damages for breach of a no-strike clause in their collective bargaining agreements.[3]

75. In both *Boys Markets* and *Lucas Flour* the union's contractual duty to arbitrate the dispute in question was not contested, and there was language in both opinions which appeared to attach some significance to this fact. *See* 398 U.S. at 254; 369 U.S. at 105, 106. Before *Gateway,* it had been suggested that the presumption of arbitrability should not be applied by a court considering whether an injunction should issue. *See* Note, *Labor Injunctions, Boys Markets, and the Presumption of Arbitrability,* 85 HARV. L. REV. 636, 640 (1972).

1. Eazor Express, Inc. v. Teamsters, 357 F. Supp. 158 (W.D. Pa. 1973). The employers brought suit in federal court pursuant to section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1970).

2. Local 377 and Local 249 were the exclusive bargaining agents for employees at Daniels' Warren, Ohio terminal, and Eazor's Pittsburgh, Pennsylvania terminal, respectively. 357 F. Supp. at 161. Eazor's suit against the International and Local 249 and Daniels' suit against the International and Local 377 were consolidated for trial on the issue of liability. *Id.* at 161 n.2. The damages issues were litigated separately. 376 F. Supp. 841 (W.D. Pa. 1974).

3. Eazor, Daniels, Locals 377 and 249, and the National Over-The-Road and City Cartage Policy and Negotiating Committee of the International (hereinafter National Committee) were signatories of the National Master Freight Agreement covering the period from April 1, 1967 through March 31, 1970. Eazor, Local 249, and the National Committee were signatories of the Joint Council No. 40, Freight Division Over-The-Road Supplemental Agreement and the Joint Council 40, Freight Division Local Cartage Supplemental Agreement. Daniels, Local 377, and the National Committee were signatories of the Central States Area Over-The-Road Supplemental Agreement, with Ohio Rider, and the Central States Area Local Cartage Supplemental Agreement [hereinafter Central States Area supplements]. *Id.* at 161.

The National Master Freight Agreement, to which all parties were signatories, contained a "no-strike" clause which stated:

> The Union[s] and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement [and in the National Agreement, if applicable] of any controversy which might arise.

Id. at 161, *quoting* National Master Freight Agreement (footnote omitted). The Central State Area supplements between Daniels, the National Committee, and Local 377 contained an express duty to "undertake every reasonable means to induce [striking] employees to return to their jobs during any [unauthorized strike]." 357 F. Supp. at 162, *quoting* Article 43, Section 2 of the Central States Area supplements.

In August 1968, Daniels discharged two Local 377 members for refusing work assignments. When the discharges were not rescinded,[4] Local 377 employees walked off their jobs at the Daniels terminal. Efforts by both the Local and International to induce the men to return to work[5] proved futile and pickets spread to Eazor's terminal where Local 249 members honored and supported the lines despite orders to work issued by the president of Local 249 who had been instructed by the International to give the orders because the strikes were illegal. The strikes, characterized by roving bands of pickets and by substantial violence,[6] continued until the strikers were discharged at Daniels' Warren terminal and the terminal was closed. Subsequently, however, Local 249 members voted to end the strike against the Eazor terminal.[7]

Upon consideration of the issues, the Western District determined that it would be advantageous to bifurcate the trial and consider the issue of liability separately from the issue of damages.[8] As to the former issue, the court *held* that the International and both Locals, as signatories of a collective bargaining agreement containing the no-strike clause, had the implied duty to use every reasonable means to end the unauthorized strikes and that the duty was not discharged when the unions merely urged their members to return to work when other reasonable means were available. *Eazor Express, Inc. v. Teamsters Union,* 357 F. Supp. 158 (W.D. Pa. 1973).

While there is a paucity of case law in this area, it has been established that a union will be liable for damages resulting from an unlawful strike if the union affirmatively or impliedly acquiesces in the employees' actions.[9]

4. The union representative designated as having the union's authority to call strikes pursuant to the Central States Area supplements met with the discharged employees and Daniels' manager on August 20. There was conflicting testimony as to whether he threatened a strike or cautioned against one, but the court found that the union representative had cautioned against the strike. 357 F. Supp. at 162-63.

5. The designated union representative instructed a union steward to tell the men to return to work and, on two occasions, personally ordered the picketers to return to work. *Id.* at 163, 165.

6. *Id.* at 161. The court did not provide a detailed decision of the acts of the violence involved.

7. *Id.* at 166-69. Subsequent attempts to end the strike failed. On August 21, an official of Joint Council No. 41 sent two men to Local 377's designated union representative to assist in ending the strike and an International organizer went to Eazor's Pittsburgh terminal to urge the strikers to return to work. The Joint Council official arranged to expedite the discharged employees' grievances. He and the Local 377 representative met with a number of strikers on September 3, but again the men could not be persuaded to return to work. International representatives also addressed the strikers, imploring them to return to work and explaining that the International could not aid them until work resumed. On September 17, the International summoned the strike leaders to Washington and read them the "riot act." *Id.*

8. *Id.* at 161.

9. Vulcon Materials Co. v. United Steelworkers, 430 F.2d 446 (5th Cir. 1970). In that case, the court cited as an example of the unions' acquiescence the failure of the union leaders to inform the employees about a new gate that was being constructed which would have permitted Vulcan employees to proceed to work without interference from the strikers picketing the primary employer. Instead, the union leaders urged the employees to return to work, but also stated that they would not cross the picket lines. *Id.* at 454.

It should be noted that the *Eazor* court used 'wildcat' to refer to a strike not authorized by union officials rather than to one not authorized by the collective

In *United Construction Workers v. Haislip Baking Co.*,[10] which involved facts similar to those of *Eazor*, the court held that a union could not be held accountable for an unauthorized strike when employees voted not to return to work unless the union was liable under the contract for strikes which it had not authorized or sanctioned.[11] Union members had engaged in an unauthorized strike over the discharge of two employees, without resorting to the mandatory arbitration procedure. Although the union merely urged the employees to return to work, it was not liable for damages since no implied duty to end the strike such as that recognized in *Eazor* was found to exist.[12]

In finding such an implied duty, the *Eazor* court obviously did not follow the precedent of *Haislip*.[13] The court justified its conclusion by noting that the national labor policy is to promote the peaceful, private resolution of disputes and that labor contracts must be read in the light of that policy.[14] In addition, the court reasoned that Local 249 and the International were bound under the National Master Freight Agreement to prohibit strikes until the grievance mechanism of the contract had been exhausted,[15] as indicated by the no-strike clause and the arbitration provision.[16] Thus, to implement that purpose, it was deemed consonant with the goal of industrial peace to imply an obligation on the part of unions to employ whatever reasonable measures were available to end unauthorized strikes.[17]

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bargaining agreement. 357 F. Supp. at 161 n.4. This definition complies with the accepted used of the term. *See* NLRB v. Draper Corp., 145 F.2d 199, 204 (4th Cir. 1944); Campbell v. Jones & Laughlin Steel Corp., 70 F. Supp. 996, 1002 (W.D. Pa. 1947).

10. 223 F.2d 872 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955).

11. 223 F.2d at 879.

12. *Id.* at 877-78.

13. It is arguably possible to reconcile the two cases. *See* text accompanying notes 22-24 *infra*.

14. 357 F. Supp. at 165.

15. *See* note 3 *supra*. The International contended that it was not a party to the collective bargaining agreements because it had not signed them and because a disclaimer at the end of each agreement relieved it of any possible liability. The court found that the International's National Committee was organizationally and functionally an administrative arm of the International; thus, the International was bound to the agreements through its National Committee. *Id.* at 168. The disclaimer relied on by the International states that the International approved of the agreement as to form only and "in doing so [assumed] no liability whatsoever under [the agreement] for the performance thereof or otherwise, and by such approval does not become a party to [it]." *Id.* at 168 n.17, *quoting* all agreements. The court concluded that since the International was a party through its National Committee, "any formal disclaimers were mere ineffectual contrivances." 357 F. Supp. at 168.

16. The parties agreed that the grievance machinery had not been used. 357 F. Supp. at 161 n.5.

17. The court quoted Refinery Employees' Union v. Continental Oil Co., 160 F. Supp. 723 (W.D. La. 1958):

> . . . [C]ourts cannot make contracts for the parties, and can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effect the purposes of the parties. Before an obligation will be implied it must appear from the contract itself that it is so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted

After finding this implied duty, the court determined that the duty had not been discharged by the unions in the instant case. The court articulated all the available reasonable means which had not been utilized in *Eazor,* stating that the International should have threatened strikers with fines, suspension, or expulsion; proceeded to impose such discipline; sent International representatives to urge dissidents to step aside to allow other men to return to work; called meetings of strike leaders; and directed strikers to vote by secret ballot. Furthermore, the locals should have removed the stewards and committeemen who were leading and organizing the strike and ensured that no strikers were employed elsewhere during the strike.[18] The court concluded by saying that "the circumstances called for politics of power rather than politics of persuasion."[19]

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to do so, or that it is necessary to give effect to and effectuate the purpose of the contract as a whole.

357 F. Supp. at 164, *quoting* 160 F. Supp. at 731. *But see* Industrial Trades Union v. Woonsocket Dyeing Co., 122 F. Supp. 872, 875 (D.R.I. 1954), *quoting* Pawtucket Mach. & Supply Corp. v. Monroe, 73 R.I. 162, 164, 154 A.2d 399, 400 (1947). While the sole issue in *Pawtucket* was the construction of a contract, the court in *Industrial Trades Union* utilized the *Pawtucket* rule of construction to interpret the collective bargaining agreement in a suit to compel arbitration. The *Pawtucket* court stated the rule to be:

> The cardinal rule in construction of a written instrument is to read its language in connection with the relative position and general purposes of the parties and to gather from it, if one can, their intent as to the particular matter in dispute.

Id. at 164, 54 A.2d at 400.

Notice the conflict in the language. Refinery Employees' Union v. Continental Oil Co., *supra,* stated that the implied language must be so clearly within the contemplation of the parties that they deemed it unnecessary to express it, while *Pawtucket* required merely that the language be read with the general purposes of the parties in mind. The former test is restrictive, and only a true logical tautology could meet it. Clearly *Eazor* would meet the *Pawtucket* test. Viewing the facts of *Eazor* in terms of the restrictive test, however, it is unlikely that the obligations of the International and Local 249 would include the duty to use every reasonable means to end an unauthorized strike. The fact that Local 377 expressly included such a duty in Article 43, Section 2 of the Central States Area supplements (*See* note 3 *supra*) indicates that the duty was not so clearly in the contemplation of the parties as expressed in the National Master Freight Agreement that they deemed it unnecessary to express it. Yet, the court found that Local 249 and the International, through the same National Master Freight Agreement had so clearly indicated their intention that this duty was within the contemplation of the language as to make its expression unnecessary in the Joint Council No. 40, Freight Division, Over–The–Road Supplemental Agreement. 357 F. Supp. at 165.

18. 357 F. Supp. at 166-67.

19. *Id.* at 167. The court's finding in *Eazor* that the unions breached their duty is puzzling in view of the particular facts involved. The International and Local officers took great pains to encourage the strikers to return to work. *See* notes 5-6 and accompanying text *supra.* There is no evidence in the record that the unions officially urged an end to the strike while unofficially encouraging its continuation. *See, e.g.,* Blue Diamond Coal Co. v. UMW, 436 F.2d 551 (6th Cir.), *cert. denied,* 402 U.S. 930 (1970), where union officials urged the strikers to return to work but told them to "read between the lines." The court held the union liable for breach of the collective bargaining agreement for discreetly urging the members to continue to strike. 436 F.2d at 558–59. The *Eazor* court required more to discharge either an express or an implied duty than at least one court has required to discharge an express duty. In United Elastic Corp. v. NLRB, 84 NLRB 768 (1949), the union expressly obligated itself to "loyally and in good faith endeavor to secure a return of strikers to work to the end that the dispute may then be settled peaceably in accordance with the procedure . . . [in the agreement]." *Id.* at 770. Although the union in *United Elastic* did begin formulation of a plan to persuade strikers to return to work, the court held that in not explicitly asking them to go to work, the union had not taken the affirmative action required by its express duty. *Id.* at 772. This

Although in *Eazor,* unlike in *Haislip,* the court held the union liable for damages arising out of the unauthorized strike, it is arguable that the decision is consistent with *Haislip* if *Eazor* is read as holding that the implied duty arises only where there is an express contractual duty imposed upon the union to refrain from striking, as was the case in *Eazor.* However, it is submitted that such a reading is incorrect on two grounds. First, the *Haislip* court did not indicate that a presence of a no-strike clause would have led it to reach a different result. In addition, the *Haislip* court stated that by failing to settle the dispute through arbitration as required under the contract, the union would be, in effect, in breach of the contract, even were the no-strike clause not present.[20] Second, even in the absence of a no-strike clause, a duty not to strike still may be implicit in the contract. For example, in *Teamsters Local 174 v. Lucas Flour Co.,*[21] the Supreme Court held that a no-strike clause will be implied if the dispute between the parties is one subject to final and binding arbitration under the contract.[22] Hence, in such situations, a reading of *Eazor,* restricting the implied duty to situations wherein there is a no-strike clause in the collective bargaining agreement would result in no imposition of an obligation on the union to use every reasonable means to end a strike over an arbitrable grievance, a result contrary to the court's apparent deference to the national policy of cultivating the peaceful settlement of disputes.[23] Consequently, *Eazor* cannot be reconciled with *Haislip.* The *Eazor* court undoubtedly would find a duty to use every available means to end a strike in a *Haislip*-like situation where compulsory arbitration was required under the collective bargaining agreement, but where there was no express no-strike clause.[24]

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suggests that the union's duty would have been discharged had it directed the strikers to return to work. The *Eazor* court, however, required the unions to do more than urge the strikers to return to work.

20. The court stated: . . . [T]he purpose of the contract was to require the settlement of disputes and grievances by a procedure [mandatory arbitration] which would not cause the disruption of business and . . . a strike without following such a procedure was necessarily a breach. 223 F.2d at 877.

21. 369 U.S. 95 (1962).

22. *Id.* at 104-105.

23. *See* note 14 and accompanying text *supra.* This is consistent with the statement in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), that the employer is entitled to the "assurance of uninterrupted operation during the term of the agreement." *Id.* at 454, *quoting* S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).

24. It is submitted that this result is a probable but not an inevitable consequence of *Lucas Flour* which did not involve a wildcat strike. A no-strike clause was implied in *Lucas Flour* to effectuate the mandatory arbitration clause. However, to hold a union liable for a wildcat strike would arguably require some affirmative agreement on the part of the union not to strike. Such consent may be implied from a no-strike clause. It is more difficult, however, to find that same implication solely from a mandatory arbitration clause. It appears that *Eazor* would apply even if a strike were not over an arbitrable dispute, as required for an employer to successfully seek a *"Boys Market"* injunction. *See* Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970). *Boys Market* required such an arbitrable dispute, holding that where the parties have contractually agreed to arbitrate certain grievances, a strike over such a grievance may be enjoined, thus forcing the parties to use the arbitration machinery.

In the *Eazor* situation, however, the union's duty arises becaues of the no-strike clause. Thus, *any* strike in violation of this clause, whether over an arbitrable dispute or not, would give rise to the union's duty to use all reasonable means to

In enumerating what means were available to end the strike, the *Eazor* court stated neither whether the union had to exhaust all the remedial measures before its implied duty was satisfactorily discharged, nor in what order each measure should have been implemented. It is submitted that since the implied duty was held to be contractual in nature, resort to *all* of the means described by the court should be required of the union in order for it to escape liability. Although it is arguable that the more severe measures are applicable only when violence accompanies the strike, the court, in failing to elaborate on the violent acts,[25] implied that the presence of violence was not critical to its holding and, therefore, every device must be employed regardless. However, the presence or absence of violence would appear to be relevant as a factor in determining when each remedial measure should be implemented. For example, when substantial violence is present, the more drastic measures of replacing the stewards leading the strike and of fining members involved in the violence should be taken much earlier in the strike. Without such violence, the union should be free to use other methods first. Again, however, should the strike continue, the union should exhaust the catalogued means in order to satisfy its contractual duty.

Focusing upon the contractual nature of the duty raises the question of whether or not the *Eazor* duty can be limited or eliminated contractually. Its resolution requires a balancing of two basic policy considerations. On the one hand lies the national policy favoring peaceful, private resolution of labor disputes suggesting that the parties should not be permitted to contract the duty away, since to allow that would be to discourage this policy goal. On the other hand lies the fundamental right of liberty of contract.[26] In balancing these competing considerations, it must be remembered that both the mandatory arbitration provision and the no-strike clause, two devices promoting peaceful, private resolution of disputes, exist only as a result of contractual agreement and as such may be contractually limited or ignored. Therefore, it is submitted that the *Eazor* duties, which seemingly arise from contractual language, also may be contracted away. A contrary result would be inconsistent with the court's contractual analysis. The question of whether the duty has been discharged could be determined by the grievance machinery should the parties so contract.

Organized labor can respond to *Eazor* in one of two ways. First, unions can attempt to eliminate potential liability arising out of wildcat strikes by bargaining no-strike clauses out of agreements. This result would

end the strike. However, where there is not a no-strike clause but there is a provision for binding arbitration, the union's liability, if any, under a synthesis of *Lucas Flour* and *Eazor* would be limited to arbitrable disputes: in such a case, the no-strike clause would be implied under *Lucas Flour*. As to other grievances, then, there would be no contractual bar to a strike. Finally, of course, there would be no duty to use every available means to end a strike when there is neither a no-strike clause nor a provision for binding arbitration.

25. *See* note 6 *supra*.

26. This doctrine was applied in a labor context in Refinery Employees' Union v. Continental Oil Co., 160 F. Supp. 723 (W.D. La. 1958). *See* note 17 *supra*.